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IN THE

Supreme Court of the United States.

October Term 1887.

THOMAS H. ALLEN, PERRY NUGENT, JOHN B. LALLANDE, and THOMAS H. ALLEN, Appellants,

vs.

BENJAMIN H. SMITH, LEVI H. SPRINGER, as Administrator of the Estate of WILLIAM H. TODD, Deceased, AND OTHERS, Appellees.

No. 185.

BRIEF FOR APPELLANTS.

Statement.

In January, 1875, William H. Todd made three promissory notes in favor of Isaac Cohen for $1,666.66 each, with ten per cent. interest from date until paid, and payable in one, two, and three years respectively, and for value these notes passed to Allen, Nugent & Company, and they sued Todd, who was a *non*-resident of Arkansas, by attachment in the Chicot Circuit Court on two of said notes, and on June 18, 1877, attached the lands mentioned in this suit as the property of said Todd, being an undivided one-half interest in part of Bellevue Plantation, in said county of Chicot, and on February 2, 1878, recovered judgment for $4,341.64, and same was declared to be a lien on the lands attached; (R., 200;) and they sued Todd on the other note in the United States Circuit Court for the Eastern District

of Arkansas, and on February 25, 1878, attached these lands as the property of Todd, and on April 19, 1878, recovered judgment for $2,206.47, and same was declared a lien on the lands attached. On July 13, 1876, Todd made his promissory note in favor of Thomas H. Allen & Company for $1,507.58, payable in thirty days, and in July, 1877, they recovered judgment on this note in Philadelphia for $1,628.21, which judgment was assigned to Thomas H. Allen, of said firm, (and who is also a member of said firm of Allen, Nugent & Company,) and he sued thereon in the Chicot Circuit Court, and on October 3, 1877, attached same lands, and on February 2, 1878, recovered judgment for $1,683.83, and same was declared a lien on the lands attached. In all three of these suits personal service was had on Todd. (Rec., 201, 202.)

At the time of the execution of the notes in January, 1875, upon which judgments were recovered, Todd was the owner of an undivided one-half interest in *Bellevue* Plantation, consisting of other lands in addition to those mentioned in this suit, and also the sole owner of Yellow Bayou Plantation adjoining it. (Rec., 239, 240.)

At the July term in July, 1876, of the Chicot Circuit Court judgments were rendered against Todd in favor of J. McMurray & Company and in favor of Jurey & Gillis, and there was then existing a statutory judgment in said Court against him in favor of W. P. Halliday, enforcible by execution.

On August 4, 1876, said Benjamin H. Smith sued Todd in the Chicot Circuit Court for $8,000 for alleged services from January 1, 1869, to date, at $1,000 a year and interest, (Rec., 186, 187,) and on August 8, 1876, attached all the personal property and crops of cotton of Todd on the Bellevue and Yellow Bayou Plantations, (Rec., 188, 189,) and on December 19, 1876, he released the cotton and attached the interest of Todd in the lands since attached in the suits of appellants and mentioned in

this suit; (Rec., 189;) and at the January term, 1877, nothing was done in his suit; and at the July term, 1877, a judgment was rendered in favor of Smith for $8,000, and the property attached was sold in April, 1878, by order made at January term, 1878, of the Court for $4,055, the lands for $3,175, and personalty for $880. (Rec., 190 to 195, inclusive.)

On August 14, 1876, the Yellow Bayou Plantation was sold under the statutory judgment of Halliday, and there was a balance of said judgment left unsatisfied. (Rec., 182.) On September 28, 1876, Todd's undivided one-half interest in part of Bellevue was sold under execution on said statutory judgment of Halliday, (Rec., 184,) and a part of such interest under execution on judgment in favor of J. McMurray & Company, and these interests were bought in by Smith, leaving only the part of said interest in this suit, and the judgment of Jurey & Gillis was paid out of the cotton that had been released from Smith's attachment. (Rec., 460.)

By the sale under Smith's judgment, all the property of Todd known to appellants was disposed of, and they, believing that said judgment was fraudulent, brought suit in the United States Circuit Court for the Eastern District of Arkansas, alleging that Smith's judgment was fraudulent, and that Smith and Todd had conspired to cheat, hinder, and delay the creditors of Todd by thus transferring Todd's property to Smith, and praying to have such judgment and sale under it declared void as to them, and to have the property that had been sold under it, and on which their attachment rested, sold to pay their judgments. After some delay the suit was dismissed without prejudice, and within a year this suit, for the same purpose and against the same parties, was brought.

The bill charges that Todd was embarrassed, and that his creditors were pressing, and that he and Smith, his son-in-law, conspired, combined, and contrived to transfer to

Smith a large part of his property to save it from Todd's creditors, and to hinder, delay, and defraud such creditors, and, as a part of their fraudulent scheme, Smith sued Todd for alleged services, when there was in fact nothing due to Smith from Todd for his services, and that there had been a mere sham defense to the suit, and for the purpose of giving an outward show of litigation; a copy of the proceedings in Smith's suit was made an exhibit to the bill; and also alleged that the property so conveyed by the fraudulent suit of Smith was worth $20,000, and more than enough to satisfy their demands under their judgments and liens, and prayed to have the alleged fraudulent judgment decreed to be void, and for sale of the property to pay their judgments. (Rec., 1 *et seq.*)

Smith answered, and denied any fraud or collusion between him and Todd, and alleged that Todd vigorously contested his suit, and that he was entitled to every cent he got, and that the value of the lands was overstated. (Rec., 13, 14.)

And Todd's administrator answered, and denied any knowledge of conspiracy between Smith and Todd to cheat, hinder, or delay Todd's creditors, and that he knew of no fraud in the suit of Smith against Todd, and that he thought the value of the lands overstated. (Rec., 16.)

The other defendants denied fraud, and said that they believed the judgment in favor Smith was just. (Rec., 14.)

Much testimony was taken, the greater part of which had no bearing upon the merits of the case, and on final hearing the bill was dismissed, and complainants appealed to this Court. (Rec., 18, 19.)

Assignment of Error.

The Court below erred in adjudging and decreeing that the complainants' bill of complaint be dismissed for want of equity, and in not adjudging and decreeing that the complainants were entitled to the relief prayed for in their

bill on account of the fraud and collusion alleged therein between the said Todd and the said Smith, and in not subjecting the property therein described to judicial sale for the purpose of satisfying complainants' just demands.

Brief of Argument.

There are many circumstances that tend to establish beyond any reasonable doubt that the suit of Smith against Todd was a mere sham and a fraud.

The suit was brought after the judgment in favor of Jurey & Gillis, which was stayed until December 1, 1876, and after the judgment of J. McMurray & Company, and while Halliday's statutory judgment was in force, and he attached all the personal property of Todd, and thus forced Halliday and J. McMurray & Company on the lands of Todd, and of these he purchased a large quantity at a nominal price of less than $3 an acre, when same was worth then $20 or $30 an acre, and afterwards released the cotton attached and levied on all the remainder of the interest of Todd in Bellevue lands, and paid off the Jurey & Gillis judgment with the cotton that was released from his attachment. Then at January term, 1877, of the Court he took no steps in his suit, but before the July term, 1877, appellants had attached the same lands, and at that term a sham answer was filed, a sham defense was made, and a jury was called and a verdict and judgment entered without any contest, the answer under the law not even putting in issue the allegations of the complaint. Five years of the time sued for was barred by the statute, which provided that "all actions founded upon any contract or liability, express or implied, not in writing, shall be commenced within three years after the cause of action shall accrue, and not after;" (Gantt's Dig., (Arks.,) sec. 4120;) and it was well known that there was a manager on Yellow Bayou, and to that extent, at least, the claim was not well founded, besides other defenses; and among them it was

and is clear that the amount sued for was not the amount that would be due, assuming that there was a valid demand and no defense to it. The time covered in the suit is seven years and seven months; and if no interest accrued, then there was due at the time suit was brought $7,583.33; but the law would give interest; and if this be counted, then the judgment should have been for over $9,900. This discrepancy between the true amount and the amount for which the judgment is rendered shows the judgment to be fraudulent unless explained by the parties. This is certainly true as to false recitals as to the considerations in mortgages, deeds, &c. (*Bump on Fraudulent Conveyances*, 85, *Ed.* 1872.) Why is it not as to judgments? And no explanation has ever been made by them, and we must presume for the reason that none could be made. (Rec., 186 to 195, inclusive.)

The amount sued for was for either a real demand, or it was a sham put forward for a fraudulent purpose. If the claim had been a real and true demand, it would have been presented for the amount actually due; if fictitious, it would likely be pressed for a round sum, as in this case. This round sum not being the true amount by any mode of calculation, shows that it was not a genuine indebtedness in the minds of the parties. This view is sustained by Todd's statement in his letter of June 30, 1876, (Rec., 271,) shortly before the attachment suit, where he sums up what he owes Smith, and makes it $3,000, and offers to confess judgment for that amount, and so secure him if others did press their claims. And again, on August 22, 1876, fourteen days after the attachment by Smith, Todd gives Smith a mortgage on all the personal property on Bellevue and Yellow Bayou Plantations (Rec., 216) to secure the sum of $5,000, which he says he owes Smith. Both of these amounts are open to the same objection—that they are fictitious amounts, and not the real amounts due, if anything at all was due; but they show that Smith's

claim for services was not taken into account by Todd as an indebtedness due Smith.

And, again, it is clear that Smith did not regard his services as an indebtedness due from Todd at any time prior to his suit, for if he had done so, he would have from time to time, as each year's salary accrued, charged the same in his account against Todd; but while he kept an account with Todd, he made no charge on his books until after he had sued, and then he even charged for seven months that he had sued for; that is, he charged for all of 1876, when his suit called for seven months of 1876, (Rec., 224 to 234,) while items of $1 or less are carefully entered by him in his accounts. And failure to make such entry upon the theory that he accidentally omitted it cannot be entertained, for he shows by his course that items in his favor are not carelessly omitted. For example: In 1870 Todd gave him a receipt for $5,817.40, said to be so much out of Smith's shares of the crops of 1868 and 1869, as a credit on his purchase of half interest in Bellevue, and he had it recorded, though not necessary to do so. Then, again, he preserved and exhibited all the little vouchers for moneys paid out by him for Todd for years in his capacity as agent for Todd, even prior to his settlement with Todd in 1873, and probated balance of his judgment against Todd's estate after all had been exhausted that he could find, in the hope that even yet more might be found. It is absurd to say, in the light of what both Todd and Smith have done, that there was an agreement between them that Smith was to have a salary of $1,000 a year for his services as agent for Todd.

Again, in 1873 Smith and Todd had a settlement of their business relations, in which Smith paid Todd $8,250, the balance of the purchase-money for the undivided half of Bellevue plantation, and also $2,350 in settlement of a transaction concerning a gin. (Rec., 245; Ex. 100, *Ib.*, 318.) In this settlement nothing was said about Smith's charges

for services; nor is there anything to show that such a charge for services existed.

Again, we submit that in all of the correspondence between Smith and Todd, (Exhibits to Smith's Dep., Nos. 2 to 25, Rec., 270 to 293,) covering nearly the entire period for which the charges are made by Smith for services, not one word is said by Todd about the existence of any such agreement or arrangement, or about any amount being due Smith for alleged and pretended service.

The omission of claim for services in the former settlements is an admission on Smith's part that there was nothing due on that account, and he is estopped now from asserting the claim to the prejudice of third parties. Indeed, the settlement had between Todd and Smith presumes everything that properly could have been included in it was included.

1 *Greenl. Ev.*, sec. 196, note 4.
2 *Whar. L. Ev.*, 1133.
Smith v. *Tucker*, 2 *E. D. Smith Rep.*, 193.
1 *Am. and En. Enc. of Law*, p. 109, sec. 3, note 2.

In the face of this presumption it would require a very strong state of case to open the settlements made, for mistake or fraud, even as between Todd and Smith.

Carlton v. *Buckner*, 28 Ark., 66.
Lawrence v. *Ellsworth*, 41 *Ib.*, 502.
Oil Co. v. *Van Etten*, 107 U. S., 325.

But, as in this case, where all the facts were equally well known to both parties, the adjustment must be final and conclusive.

Hager v. *Thomson*, 1 Black, (U. S.,) 80.

Coupled with this, all the correspondence between Todd and Smith touching their accounts being silent as to serv-

ices rendered by Smith, he should not be allowed now to set them up to defeat the just claims of Todd's creditors.

Van Haselt v. *Sack*, 4 Moo. P. C. C., 185.

Care v. *Mills*, 7 H. & N., (Exch.,) 913.

Nor is any mention or intimation made of the existence of any such agreement or arrangement in his correspondence with the several managers who were from time to time during said period in charge of the management of the Yellow Bayou plantation. There is not a word in the record from him upon the subject, notwithstanding he has written pages concerning his business in all its particulars and phases.

On the contrary, when he desired the services or aid of Smith for any purpose in connection with the Yellow Bayou plantation, he gave him specific power and authority in writing. This was done as late as November, 1874, when trouble arose between Mr. Seamen, the manager of Yellow Bayou, and Mr. Todd, as may be seen by reference to Exhibit 14 to Smith's deposition. (Rec., 283.) Had the relations existed, as claimed by Smith, between Mr. Todd and himself, such specific authority would not have been essential.

Living and interested witnesses may now testify as to what Mr. Todd may have said upon this subject, but the fact that in his letters, in which he goes into details concerning his business, even to a concise statement of the amount he owed Smith for advances (Rec., 271) up to June 30, 1876, and which was secured and paid, speaks strongly in favor of the truth, namely, that Smith's claim for $8,000 for services is fraudulent, and never really existed.

Smith's own statements in regard to his alleged claim of $8,000 are anything but satisfactory, and his acts show that there never was a well-defined and just claim in existence.

For instance, in July, 1879, (Rec., 227,) he charged in his

account, which was probated against the estate of Todd, for services rendered in 1876, 1877, and 1878. The item of 1876 conflicts with the alleged and pretended claim upon which judgment was taken for $8,000, (Rec., 186, 187,) showing that the accounts in either case in this respect were without foundation, but were created by collusion between Smith and Todd for the purpose of defrauding the legitimate creditors of Todd, as averred in the bill of complaint.

Again, it is submitted that the judgments in favor of Smith and Cooper were recovered, respectively, on the 25th of July, 1877, and 16th of January, 1878. (Rec., 190, 215.) Mr. James F. Robinson appeared as counsel for Smith, (Rec., 186,) and also for Cooper. (Rec., 211.) Mr. Martin appeared for Todd in Smith's case. (Rec., 100.)

It is rather significant that Smith in his probated account (Rec., 226) has charged the sum of $400 as having been paid—$200 each—to Robinson and Martin in the months of January, February, and March, 1878.

The several letters, which are exhibits to Smith's deposition, only give one side of the correspondence, and at best they only disclose a general reference to family and business affairs such as one member of a family would write to another. There is nothing in them to indicate that Smith was an agent of Todd under salary, but that as father-in-law and son-in-law they had an interest in each other's affairs that was not governed by the rule of compensation. He may have represented, and probably did in this way represent, Todd.

But in taking testimony in this case, Smith seems to have been impressed with the idea that he must establish that he was working or acting under a contract for a salary, and tries to prove such contract by his own evidence, (Rec., 240 and 259,) by his brother-in-law, Derringer Todd, (Rec., 89, 90,) by his sister-in-law, Mrs. Bowles, (Rec., 92, 103,) by his wife, (Rec., 108, 130, 131, 136, 137,) by his brother-in-law, Richard H. Todd, (Rec., 139, 148,) and by his

brother-in-law, Cornelius Bowles; (Rec., 166, 168, 169;) and yet in all these he fails, if we leave out his own testimony, or if we give such weight to it as it deserves. His evidence is, that he and Todd worked the places in partnership in 1868 and in 1869, and after that he owned a half interest in Bellevue, and looked after that and the half interest of Todd in Bellevue and his Yellow Bayou place. So if there ever was a contract for $1,000 a year for services, it would only last for one year, or at most not longer than the conditions remained the same. Todd lived in Philadelphia, and Smith's wife and family made their home with him there, when not in Arkansas, and they were in Arkansas but a small part of the time; and the presumption is that all the family expenses and all services were given and rendered free of charge, and could not be recovered at law by either party in the absence of an express contract.

In *Bump, supra*, 257 *et seq.*, it is said:

"The law implies no promise to pay for services rendered by members of a family to each other, whether by children, parents, grandparents, brothers, step-children, or other relations. The rule rests upon the simple reason that such services are not performed in the expectation or upon the faith of receiving pecuniary compensation. The services rendered in such cases are mutual, and it may often be difficult to decide upon which party the principal benefit is conferred. Services so rendered do not, therefore, constitute a valuable consideration for a transfer."

Ib., 96, *and cases cited.*

And certainly no contract existed beyond the one when Smith came to Arkansas and while he had no interest in the property beyond an interest in the crops. Aside from Smith's evidence, there is nothing to show that an agreement or contract for $1,000 a year for wages ever existed, and Mrs. Smith says if there had been such contract in writing she would have heard of it, and of course if there

had been such verbal contract it would have been talked of as much, or more, than if in writing, and she would certainly have heard of it. Smith says that he don't remember that he ever told his wife of it or mentioned it in her presence. He asserts that there was a verbal contract made in 1867 for $1,000 a year between him and Todd, and in the presence of Mrs. Todd, and that Mr. and Mrs. Todd are dead, and he don't remember that it was ever mentioned afterwards in the presence of his wife or of any other member of Todd's family.

If he is to be believed as to there ever having been any such contract made at all—and it will be a heavy demand on the Court's credulity to believe any statement of his after reading his evidence in this record, unless such statement is corroborated—then we have the case of a man starting out to work for $1,000 a year under a contract, and never mentioning such contract to any one, (and the party with whom it was made never mentioning it to any one,) and never claiming any of his wages, though indebted to the man that was to pay such wages, and claiming everything else, and keeping books of account with the party to pay such wages, and never entering up the item of the salary in the books for a period of more than nine years, and then only when it became necessary to trump up a claim to capture his father-in-law's property to save it from creditors. Such state of things is not in accordance with the usual course of events, and it can hardly be true.

And even if there was a verbal agreement or understanding that Smith was on wages, and there had been no settlement for the same for years and up to the time that Todd became embarrassed and was being pressed by his creditors, then Smith could not maintain his judgment as against creditors of Todd; it would be fraudulent as to them, though it might be good between Todd and Smith.

Dick *v.* Grissom, Free. Ch. R., (Miss.,) 428, and cases there cited.

And again we may judge of the character of one action and the intent of the parties by similar action about the same time by the same parties.

Castle v. *Bullard*, 23 How., 172.
Lincoln v. *Claflin*, 7 Wall., 132.

Let us look into the judgment against Todd in favor of Cooper in the Chicot Circuit Court rendered at its January Term 1878. Todd said in his letter to Smith on June 30, 1876, (Rec., 271,) that he owed Cooper $3,151; and on August 18, 1876, he conveyed him a lot for $2,000 on this debt. (Rec., 150, 162, 500.) On same day he executed bond in favor of Cooper for $3,150, and on September 24, 1877, confessed judgment in favor of Cooper in Philadelphia for $3,150, (Rec., 211,) when Cooper swears that the debt then might have been $1,600 or less, and that he knew nothing of the confession of the judgment; (Rec., 159;) and on January 16, 1878, Todd confessed judgment in the Chicot Circuit Court in favor of Cooper, and based on the said judgment of September 24, 1877, for $6,417.60, (Rec., 215,) when Cooper swears that Todd then owed him $1,500 or less. (Rec., 161.) An execution was issued on this judgment, and in April, 1878, two valuable plantations—Bellevue and Yellow Bayou—containing some 7,800 acres, were sold for $61.25, less than one cent an acre, and passed to Smith (Rec., 202–209) in the scheme of covering up Todd's property.

The Cooper transaction, which resulted in a judgment against Todd for a larger sum of money than was owing, and which resulted in placing in Smith's hands valuable property of Todd, by reason of which his real creditors were deprived of their rights, is an unmistakable badge of fraud. And inasmuch as Smith was cognizant of all Todd's business affairs and financial embarrassments, and reaped the benefits of Todd's fraudulent practices concerning Cooper by purchasing the property, directly and indirectly, at the

judicial sale, we think the fraud in Cooper's transaction is a proper matter for the consideration of the Court in the determination of the appellants' rights and equities in this suit. The fraud in this respect is made apparent and convincing by Mr. Cooper himself.

Mr. Cooper swears that the largest aggregate indebtedness of Mr. Todd to him at any one time would reach $2,500; that when Todd died he owed him $1,100. (Rec., 159.) *He has no knowledge that Todd confessed a judgment in his favor for* $6,300 *in the Common Pleas Court in Philadelphia, September* 24, 1877. (Q. 14 and Ans., Rec., 159.) He placed his claim of about $1,500 in the hands of a lawyer in Chicot county, Arkansas, upon condition that he would incur no expense unless the claim was collected. He has received no information of its collection. (Rec., 160.)

The record of the judgment fraudulently confessed by Todd without Cooper's knowledge is in evidence. (Rec., 210 to 215.) The judgment consented to by Todd in person in the Circuit Court of Chicot county, Arkansas, for $6,417.60 is also in evidence. (Rec., 215.) The execution and return of the sheriff are found in evidence. (Rec., 202, 203.)

Robinson, who had acted as attorney, purchased some of the property, and Benjamin H. Smith the balance. (Rec., 204 to 209.) Robinson assigned his interest in the certificate of purchase to Benjamin H. Smith, (Rec., 208,) and thus Smith received by means of a fraudulently-confessed judgment the possession of these large and valuable tracts of land. Under the circumstances, the confession of judgment by Todd amounts to more than a suspicion of unfairness.

Bump, supra, 539, note 5.

The claim transmitted by Mr. Cooper to an attorney in Arkansas it seems was not sued upon in that State; but

another unjust, illegitimate, and fraudulent claim was made the basis of a suit without Cooper's knowledge, upon which a judgment was entered for a fraudulent amount by the consent of Todd. Immediately thereafter Todd's son-in-law (Smith) became the beneficiary of the fraud, as he had done before in his own fraudulent claim and judgment, and concentrated in himself, by collusion with Todd, the entire property of the latter, leaving the just demands of the appellants, who are creditors of Todd, unsatisfied, and without hope of satisfaction and payment, unless in equity they can reach and have set aside these frauds, which are the result of collusion on the part of and between Smith and Todd for the purpose of fraudulently placing and retaining the title of said property in Smith to defraud the appellants.

We think there has been sufficient fraud established in connection with the suits of *Smith* v. *Todd* and *Cooper* v. *Todd* to sustain the averments of the bill and to subject the property therein described to judicial sale to satisfy appellants' judgments and demands.

And again, the suit by attachment was not necessary, if in fact there had been any sum justly and honestly due from Todd to Smith for these alleged services. As Todd had offered to confess judgment, and had made a mortgage to Smith, then there must have been a purpose in bringing the suit, and that purpose could not have been an honest one.

The characters of the men tend to show the nature of the purpose. Todd, who tried to secure services to him, and then not pay for the services so rendered, as in the case of Mr. Mole, (Rec., 22, 23, 25, 27,) and Mr. Kirk, (Rec., 38,) it would not be too much to say that he showed he was a man who would not hesitate when his pecuniary advantage was involved; and Smith—who swears to one thing at one time, and then swears that his first statement was not true, (Rec., 7, 260,) and who, after his wife had

received as an advance from her father, to be charged against her interest in his estate, $4,500, (Rec., 29,) and had gotten all the remnant of his property in Philadelphia for alleged advances made to her father by her, (Rec., 34,) and after he himself had gotten all the remnant of his father-in-law's property in Arkansas by attachment for imaginary or actual services, and would then let the funeral expenses of that father-in-law remain unpaid, (Rec., 263,) while he himself retained the property thus acquired—would be a fit man for the work of aiding to cover up property and to keep it from creditors entitled to it.

The contradictory statements of Smith throughout this case must condemn him, for he will not be heard to allege things contradictory to each other, or, as Lord Kenyon expressed it, "to blow hot and cold," to suit his own convenience and to promote his own interest.

Broom's Legal Max., 169 *et seq.*, (8 *Ed.*,) and cases cited.

The witness, Mrs. Mole, gives a solution of the matter of the suit for $8,000 when she says it was an arrangement between Todd and Smith to protect Todd and his children from his debts or liabilities. (Rec., 42, 47.)

It is true that they try to smirch Mrs. Mole on account of her numerous marriages, but she was certainly indorsed by her father as a pure-hearted woman, (Rec., 25,) and stands as fair as any of the lot. Smith, Todd, and all of Todd's children in this matter have shown themselves to be a "bad lot," but Mrs. Mole is as good as the best of them, or better, and her statements are sustained by the surroundings. But she was not on trial for many marriages, for it may be said here, as was said in Ambrose Rookwood's case, 13 How. St., p. 211, by Holt, Ld. Ch. J., in an attempt to impeach a witness, "Look ye, you may bring witnesses to give an account of the general tenor of his

conversation, but you do not think sure we will try now at this time whether he be guilty of robbery," &c.

If Smith is to be believed, he was Todd's agent, and cognizant of all his business transactions in Arkansas. He knew of the debts upon which the appellants now seek to recover, as well as the other business transactions complained of. In fact, he was the prime actor in some of them. They all took place during the period embraced in his suit for services. Yet the evidence shows that Smith's pretended claim for services as such agent or manager was not disclosed, but concealed by him and Todd from all persons with whom dealings were had, including appellants, until August 4, 1876. The principle that "a man who remains silent when there is a duty to speak is bound in equity," is applicable to Smith. If Smith's claim was a just one, his concealment was a fraud upon appellants.

Kerr on F. and M., pp. 130, 131.
Bump, supra, 81 *et seq.*

Again, Mrs. Mole is sustained in other matters. She says the judgments of Halliday and of McMurray, for which Todd's half interest in part of Bellevue was sold, was to have been paid in cotton, (Rec., 47,) and Smith in his evidence says the mortgage of August, 1876, was made to secure him "for any money he might pay out on the Jurey & Gillis and McMurray & Company judgments, or any other judgments against him." (Rec., 251.) Now, if the Halliday and McMurray judgments had been paid, or the money paid back to Smith after the sale, it would have released or redeemed the large part of Bellevue that was sold under these judgments for merely nominal sums, and would have left the real interest of Todd in these tracts for him and his just creditors. Todd had thus provided for means to redeem the part of Bellevue sold under these judgments of Halliday and McMurray, and was, as his let-

ters show, trying to raise funds to redeem Yellow Bayou; and had he done so, might have paid all of his debts, and kept his property, as Mrs. Mole says he hoped to do; but Todd, failing in these efforts, he and Smith carried out their fraudulent scheme, and Smith retained what had passed to him by the sales under the Halliday and McMurray judgments, after he had been secured for the money to pay these very judgments. According to his own statements, the mortgage was made in August, 1876, and the sales were not made until September 28, 1876.

By Smith's shrewdness and management he had for the paltry sum of $1,294.35, the amount of the McMurray and Halliday judgments, and which sum was secured to him by the mortgage, which he accepted and placed of record, and his claim for wages under the circumstances named, obtained before the institution of this suit, and now holds, an undivided one-half interest in a plantation for which he, for the other half interest, in 1869, at private sale, paid and agreed to pay the sum of $19,250, and to which plantation there had been added other property purchased at public sale for some $4,500, and all of which property had been greatly improved during the time by outlays from the crops and from other sources. These facts are not denied, and are of themselves sufficient to show the purposes of Todd and Smith.

Graffam v. *Burgess*, 117 U. S., 186, 187.

True, he tries to claim something for the real estate bank mortgage, but his deed expressly recognizes this mortgage, and he bought subject to it, and he agreed to pay $19,250 for it.

Smith says that Todd was a man of wealth in 1868, the year that Smith came to Arkansas, and so he was; and yet Smith, who then came, as he says, on a salary of $1,000 a year, and who now speaks contemptuously of other men that have filled the same position for from $600 to $720 a

year, now claims to own all the property in Arkansas then owned by Todd, while his wife holds a large part of what Todd had in Philadelphia, and Todd's creditors are not paid, and his other children are left with nothing from his estate. While we are not called upon to trace how all this property changed hands in so short a time, still it is not explained by Smith, who should have given an explanation if there was an honest one that could have been given. When matters are honestly conducted between members of a family, such results are not reached, at least not often, in so short a time.

Smith introduced much testimony to show that he managed Yellow Bayou and was the financial agent of Todd in his business in Arkansas. It was never denied by appellants that Smith was the agent of Todd, and that he shipped his crops and attended to his financial affairs in Todd's absence, as one member of a family might be expected to do for another in his absence, situated as the parties and their families were in this case; but appellants contended that the management of Yellow Bayou was in the hands of other competent parties as managers, as shown by the evidence of the managers and of the leading tenants on the place, and that Smith did not in fact perform the services for which he claimed pay in his suit.

The object of Smith seemed to have been to show what Smith's services were reasonably worth, and that he ought to have recovered on that if there was no contract; but this we have seen cannot be the basis of a lawful demand as against creditors in the absence of a contract, or even with a contract, and so do not deem it necessary to allude to it further than to say that it is clear from the testimony that he did not render the services claimed for; and certainly such claim could not equitably, even in the absence of fraud, be maintained against demands growing out of business in relation to the property that Smith exercised control over as agent of Todd in Todd's absence.

As to the lien of Woolfolk, mentioned in Smith's answer to have existed at the time of his purchase, it does not aid Smith to explain his conduct in relation to the suit for services. It was a lien at the time he bought, and he knew of it, and relied on Todd paying it off, and at the time of his attachment suit, in 1876, no suit had been brought by Woolfolk, (Rec., 265, 266,) and Smith was under the impression at the time that Woolfolk could not recover, and did vigorously contest the suit when it was brought, and carried the case up to this Court, where it was finally decided, and is reported in 115 U. S., 143. And for another reason Smith cannot justly consider even this decree a hardship on him, for he has been able to make much more out of the place than enough to satisfy such decree while he has been holding same under his fraudulent purchases in 1876 and under his fraudulent judgment in 1878. He asserts that he was able to pay off over $10,000 from his own half interest between 1869 and 1873.

Then, upon the whole case, the fraud of Smith in procuring title through sales of these lands vitiates the sales.

Sands v. *Codwise*, 4 Johns., 536.
Gilbert v. *Hoffman*, 2 Watts, 66.
Jackson v. *Summerville*, 13 Penn. St., 359.

The strictures upon the conduct of the vendee in *Byers* v. *Surget*, 19 How., 303, are not wholly inapplicable here.

And, changing the attitude of father and son to that of father-in-law and son-in-law, the language used in *Marshall* v. *Green*, 24 Ark., 423 *et seq.*, is pertinent in this respect.

The amended answer of Smith and of Springer, as administrator of the estate of Todd, alleges that the claims of appellants were not exhibited to said administrator within the two years as provided by statute.

The bill charges that the original suit for the same purposes as this one was instituted in May, 1878, and that pending the suit Todd died, and that afterwards it was re-

vived against said Springer as administrator of the estate of Todd, (Rec., 4,) and this is not denied.

The effect of this revivor was to exhibit the demands against the said estate. The statute provides that "all actions pending against any person at the time of his death, which, by law, survive against the executor or administrator, shall be considered demands legally exhibited against such estate from the time such action shall be revived, and shall be classed accordingly."

Gantt's Digest, (Ark.,) sec. 99.
Mc Coy v. *Jackson*, 21 Ark., 474.
Pope v. *Boyd*, 22 Ark., 537.
Williamson v. *Mc Creary*, 33 Ark., 473.
Eddins v. *Grady*, 28 Ark., 500.

It was not necessary to make affidavit to the demands of appellants in order to revive the suit; and as there was already a specific lien fixed on the lands by the attachment suits of appellants, no affidavit of the justness of the demands in enforcing that lien was necessary.

Hall v. *Denckla*, 28Ark., 512.

There is not even a valid technical defense to appellants' suit.

And it is respectfully submitted that the decree of the Court below should be reversed.

A. H. GARLAND,
For Appellants.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1888.

In Chancery. No. 12.

TIMOTHY CASE, RECEIVER, &c.,

vs.

DAVID M. KELLY, HENRY KETCHUM, ET ALS.

MOTION.

OCTOBER 9TH, 1888.

And now comes Walter C. Larned, solicitor for the appellant, and presents to the Court the written appearances of the heirs and representatives of Henry Ketchum, deceased, and moves the Court that they be made parties defendant herein, and that an order be entered requiring them to file a brief herein within thirty days; in default whereof they will be held bound by the decision of the Court to be rendered herein.

WALTER C. LARNED,
Solicitor for Appellant.

STATEMENT.

Mr. LARNED: There is some trouble in this case about the appearances of the heirs of one of the defendants, Henry Ketchum, who is deceased. At the last term of Court the death of Ketchum was suggested. His death was not known to me in time to take proceedings under the 15th rule to bring the heirs into Court at the last term, and I had with me at the time of the argument an authorization from their attorney to enter their appearances, and so the case went on

and was argued at the last term, but the Court held that the appearances were not formal, and requested me to get their appearances, which would answer the requirements of the rules of the Court. I have accordingly in my hand the individual appearances of the heirs of Ketchum, which have been filed here, and I ask of the Court an order that they shall be made parties defendant to this suit. These appearances are hereunto subjoined.

Mr. Justice MILLER: Won't you read what you have got?

Mr. LARNED: Yes, sir (reading).

I desire a further order, after the parties shall be made, that they shall file briefs, if they desire to do so, say within thirty days.

It has been almost impossible to bring these heirs in by ordinary proceeding, some of them living in remote places, as far as Montana, but they desire to come in, and here are their own individual appearances signed by each one of them.

The purpose of this motion is not antagonistic to the rights of the heirs of the deceased defendant, Henry Ketchum, for they desire to be brought into this case and have it finally decided. They have shown this desire by filing the aforesaid written appearances, which were obtained from them by their attorney in Wisconsin. The names of the heirs and representatives of the defendant, Ketchum, to be affected by this order are subjoined, and are as follows:

Laura E. Floyd.
Russell G. Floyd.
C. H. Ketchum.
Jennie Ketchum.
Theodore H. Earle.
Maranda L. Earle.
Ella C. Ketchum.
Truman A. Ketchum.
Harriet N. Rich.
Charles Rich.

APPEARANCE.

In the Supreme Court of the United States. October Term, A. D. 1887. No. 147.

TIMOTHY CASE, Receiver Green Bay, Winona and St. Paul R. R., Appellant,

vs.

D. M. KELLEY, HENRY KETCHUM, GEORGE HILES, and ARCADIAN MINERAL SPRING CO., Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin. In Chancery.

The death of Henry Ketchum having been suggested in the above-entitled cause, we, his heirs and representatives do hereby enter our appearances in said cause and agree to abide the decision of the Court therein, excepting and reserving the right to make further argument and file a brief in our behalf if upon investigation we find that our rights therein have not been properly presented to the Court.

(Signed) RUSSELL G. FLOYD.
LAURA E. FLOYD.
C. H. KETCHUM.
JENNIE KETCHUM.

APPEARANCE.

In the Supreme Court of the United States. October Term, A. D. 1887. No. 147.

TIMOTHY CASE, Receiver Green Bay, Winona & St. Paul R. R., Appellant,

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(Signed) THEODORE H. EARLE.
MARANDO L. EARLE.
ELLA C. KETCHUM.
TRUMAN A. KETCHUM.
HARRIET N. RICH.
CHAS. RICH.

Office Supreme Court U. S.
FILED.
FEB 17 1888
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

October Term 1887.

ALLEN ET AL.
vs.
SMITH ET AL. } No. 185.

Reply Brief for Appellants.

The statute of *non-claim* has no resting-place in this cause, for, the first suit was brought in May, 1878, during the life-time of Todd, and it progressed to issue, depositions, &c., and was dismissed *without prejudice* in December, 1881, after the death of Todd, which occurred in 1879; and in November, 1882, in less than one year from this dismissal, this present suit was brought, which, under the statutes of Arkansas, preserved the rights of appellants as they stood at the time of the dismissal. (*Gantt's Dig.*, (*Ark.*,) sec. 4138.) These facts, as to the former suit, are averred in the bill with distinctness, (Rec., 4, 5,) and are admitted in the answers. (Rec., 13, *et seq.*) The affidavit of Springer, that he was not served with process in the first suit, is of no avail, and is entirely superfluous. It cannot meet the record in this way. (*Fowler* v. *Byrd*, Hemp. C. C., 214.) Aside from this, this proceeding is not one to recover these debts out of the assets of Todd's estate, for really Todd had no estate if Smith's sales are to stand. Smith had industriously taken all of Todd's estate in, and this suit is to unravel the tortuous proceedings by which this was done, so as to pay these debts. And the

statute of *non-claim* is not held to be in the way of an independent proceeding to do this. These debts might have been proved also against the estate of Todd, but what was the use? So that, these creditors say, we will resort to a court of equity to undo this network of concealment and fraud, (*Wilson* v. *U. S.*, 118 U. S., 89,) and then ask the Court—taking jurisdiction for one purpose, it will do so for all purposes legitimate—to subject these lands, thus unrighteously obtained, to the payment of these debts. (*Ford* v. *Apperson*, 23 Ark., 752.)

In asserting the independent equity jurisdiction upon any ground that it may exist, it has been often held the statute of *non-claim* cuts no figure. (*Pope* v. *Boyd*, 22 Ark., 535; *Turner* v. *Hornor*, 29 *Ib.*, 440; *Richardson* v. *Hickman*, 32 Ark., 406; *Ib.*, 297; *Ib.*, 443.)

The hint in appellees' brief that Mrs. Tyson is not worthy of belief, because of her signing her name with a mark, is not in itself tenable, as the Court could not measure credibility in this way. There can be no necessary connection between the two. And besides, if applied here, it would sweep away many depositions relied on by appellees in this case. The proposition goes much too far just now.

It is still asserted the value of Bellevue is overstated by appellants. The contrary is true. In Craig's deposition (Rec., 395, *et seq.*) it is stated he and another gentleman called on Smith to buy Bellevue, and, after thinking it over some days, Smith answered that it would take $75,000 to buy it, and the bank mortgage left out—that is, the purchase would be subject to that mortgage. This from Smith himself goes quite beyond the valuation put on it in the bill. Besides this, the depositions of other witnesses as to its value, upon a general average, put it at over $40,000. And so Smith has this valuable property (Todd's one-half), worth not less than $20,000, for not quite $4,000, his bid on the sale of the real estate; and nearly half of his fraud-

ulent judgment unsatisfied. This is argument enough to put the whole thing under condemnation, and for this reason no one in the country there cared to bid at the sale. Upon its face it was a farce, and there were many in the vicinity, as the record shows, that coveted that lovely amongst the loveliest of cotton plantations.

Complaint is made that many small matters—trifles, in fact, in themselves—are introduced here. It is true, because only by such means, as was said in 24 Ark., 423, can these crooked ways be got at and put aside. But in all actions for the unveiling of fraud the very largest latitude is given to the admission of evidence. (*Butler* v. *Watkins*, 13 Wall., 456.)

The Court will notice, that to Todd's answer to Smith's suit for $8,000 there is no affidavit by him or his attorney. The Arkansas Code of Practice (sec. 135, p. 57) requires answers to be sworn to; they are as no pleadings if not sworn to. The answer was a mere general denial at best, and in effect it was a confession of judgment, only leaving Smith to assess his damages. It was about as unsubstantial a disguise to avoid a direct confession of judgment as could have been made up.

When the facts show that Hicks and others received large wages—$1,000 or more per year—for services in managing cotton plantations, they show, too, they were men experienced and skilled in that business; whereas, in this case, we find a young, "sea-faring" captain, who probably had never seen a cotton-field or a cotton-stalk, whose "life" had been "on the ocean wave," and whose "home" had been "on the rolling deep," brought down, as he states, without any experience at all in this work, and put over a large plantation at this handsome salary! The thing is too romantic for sober settled belief to fasten on. It is true, it is shown in the record that for a good many years there

were terrible overflows of the Mississippi river, when at times this great river was an "inland sea," indeed—from the hills in Arkansas to those in Mississippi one sheet of water, probably from seventy to ninety miles, would flood the country, Bellevue and all other land *views*. Maybe here it was, in this vast waste of waters Mr. Todd wanted the nautical skill of his son-in-law, but certainly not to see to the planting, raising, and selling of cotton, that attractive but precarious business that has wrecked many, many more besides Todd and Smith, and better versed in the calling than they.

Appellees do not deny, but admit, that Todd was deeply embarrassed, and he was fighting his creditors off "with might and main" on all parts of the ground. See his letter to Smith (Rec. 271), when he tells him to see that Mr. Robinson (Robertson) enjoins the Halliday judgment *if he has to speak half a day and within an inch of his life*. This Halliday claim was an undisputed one too. And in this letter Mr. Todd gives Mr. Robinson high praise for *solid sense*. The idea of calling on a man of solid sense to speak half a day in any case! Think of it! But that is not all: He wants him to imperil his life within an inch—and that to defeat or postpone a just demand. So desperate was the old man, and his son-in-law as well, they combine and confederate to sport with Mr. Robinson's life and his solid sense to avoid creditors. Instead of getting out an injunction against Halliday, Mr. Robinson ought to have resorted to some legal process to suppress Todd and Smith for conspiring against his life. This demand on Mr. Robinson is enough to disturb the sensibilities of Derringer Todd. And yet it is of the same sort and measure of the conduct of these parties throughout this whole affair.

Respectfully submitted,

A. H. GARLAND,
For Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1887.

THOMAS H. ALLEN, PERRY NUGENT, and JOHN B. LALLANDE, Partners under the firm-name of ALLEN, NUGENT & CO., and THOMAS H. ALLEN, Appellants,

vs.

BENJAMIN H. SMITH, LEVI H. SPRINGER, Administrator of WILLIAM H. TODD, Deceased, et al.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR APPELLEES.

U. M. ROSE,
Attorney for Appellees.

Press of Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term 1887.

THOMAS H. ALLEN, PERRY NUGENT, and JOHN B. LALLANDE, Partners under the firm-name of ALLEN, NUGENT & Co., and THOMAS H. ALLEN, Appellants,

vs.

BENJAMIN H. SMITH, LEVI H. SPRINGER, Administrator of WILLIAM H. TODD, Deceased, *et al.*

No. —.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

We submit that the case should not be in this Court. It involves no point of questionable law. On the facts, the decision below was plainly correct.

A drearier transcript of 500 pages could not be found, and a continuous reading of it would probably produce in most persons cerebral anæsthesia. The reason for this dreariness is that nine-tenths of the matter contained in it is wholly irrelevant, and that the remainder is expanded and drawn out until it becomes tedious almost beyond previous example.

An illustration of this quality may be seen by reference to the deposition of Mrs. Smith, (page 106,) which, excluding the questions asked in-chief, would hardly fill a single printed page. To this witness counsel for plaintiffs below

managed to propound four hundred and six cross-interrogatories. A fair specimen of this cross-examination is the following, copied from page 117:

"113 Q. How was the cotton divided at the gin?

"A. I don't know.

"114 Q. Who divided it?

"A. That I don't know; I was not present.

"115 Q. How do you know it was divided at the gin?

"A. My father and Capt. Smith would meet there for that purpose.

"116 Q. How do you know that your father and Captain Smith would meet there for that purpose?

"A. Capt. said he was going over there for that purpose.

"117 Q. Do you know that he went there for that purpose?

"A. When he was going to divide cotton he would carry slips of paper to mark weight on, and a pencil.

"118 Q. Are you positive he carried a pencil?

"A. I am positive he carried a pencil.

"119 Q. Do you remember whether it was a red or black pencil, and how long it was?

"A. No, sir.

"120 Q. When you went on the Bellevue plantation in the spring of 1870, did you observe whether or not there had been a cotton crop made on said plantation in 1869?

"A. No.

"121 Q. In going from Yellow Bayou to Bellevue do you not pass through or along the turn road of the cotton field at Bellevue?

"A. I do not recollect, it is so far back.

"122. Q. Was it any further back than the pencil you have just referred to?

"A. The pencil referred to was used at the Bellevue gin in dividing the crops.

"123 Q. How far back was the pencil business?

"A. From the crop of 1868.

"124 Q. What crop of 1868?

"A. Cotton crop."

And so on, world without end.

In the same manner letters, bills of lading, bills of sale, sale bills, deeds, and every kind of documentary testimony

were thrown in by the plaintiffs pell-mell, and seemingly with little or no regard to relevancy.

The explanation of all this is that the bill was a fishing bill from the start. This may be seen by letters written by one of the counsel for appellants in the Court below, dated "Lake Village, Ark., Nov. 2, 1882," and addressed to "Edwin Mole, Esq., Boyersford, Chester Co., Pa."

"DEAR SIR: Yours of 24th ult. received. It will not be necessary for any of the heirs or yourself to come out here to give evidence; all evidence will be taken by deposition.

"What I want to know is in regard to the consideration, if any, for the judgment for $8,000.

"Smith makes out a claim for 8 y'rs' service in attending to Yellow Bayou & Todd's half interest in Bellevue, and swears it is due, & gets judgment for it, & sells Todd's half interest in Bellevue for some $4,500, & holds claim against the estate for remainder. If Todd, in fact and in good faith, owed Smith $8,000, then the suit was warranted. But if, in fact, he did not owe it, or any considerable part of it, then the judgment & all proceedings under it were void, & can be set aside, *& the half interest in Bellevue go first to pay Todd's creditors, & the balance go to the heirs.*

"The question is, did Mr. Todd in fact owe Mr. Smith $8,000 at the time he sued in 1877, & when judgment was rendered in the suit? This may be determined by learning, first, whether or not Smith did render the services he claims to have rendered; and, 2nd, if the services were rendered, were they not paid for from time to time? Did Smith have charge of Yellow Bayou for Mr. Todd during the time from 1868 to 1877? Were not others employed by Todd who had control of Yellow Bayou, & reported directly to Todd, and not to Smith? If any parties had charge of Yellow Bayou for any of the 8 years, who had such charge, and for what years? Did Smith have charge of Yellow Bayou during the years you were there? Who shipped the Yellow Bayou crop? Did Smith, at any time prior to the bringing of the suit, claim that Todd owed him for services? Did not Smith owe for the half interest in Bellevue, or some part of the purchase-money? And if

so, how did he pay it, and where? Was he not given credit for any services he rendered in his settlement for the half interest he was to pay for in Bellevue? Was he allowed anything out of the crop on Bellevue from year to year to pay for the services in representing and looking after Mr. Todd's half interest? I have asked these questions by way of suggesting the information I need in the suit.

"If anything was ever due Smith for these services, and he was paid, then the suit was fraudulent; or if anything was due, and nothing like $8,000, then the suit was fraudulent. If he had no charge of Yellow Bayou for the time he charges for them, the suit was fraudulent. In thinking over the question, facts will suggest themselves, and I can allege them in my suit to make out a case, and then I can take your deposition and the depositions of others to prove the facts as charged.

"*If the suit succeeds, the creditors will get the benefit of it, and there is enough to pay all of them, and yours, of course, I will not overlook.*

"The question is not whether the heirs will testify, but is, what facts can they testify to that will show that Todd did not owe Smith the $8,000 he sued for when he sued for it, and when the judgment was rendered. You need not be at any expense, or, if any, at but little, in finding out what the heirs know; and then, when the depositions are to be taken, there will be some expense, but not much, and it will be paid as costs, and so you will not lose it in any event. You now understand what information I want from you and from the heirs if they have it."

This letter brought forth the following answer from one of the heirs:

"PHILA., *Nov.* 21, 1882.

"DEAR SIR: In reference to the matter of which you spoke in a letter to Mr. Mole, according to his statement made to my brother William, the same come to me from him that you request valuable information. I wish to state to you that the heirs are in very moderate circumstances, and too poor to defray the expenses that might incur to the affidavits. If we had the money we would not hesitate; therefore we are compelled to ask you to send the money

to facilitate the matter, in which we propose to tell the truth. Such truth will be valuable to the creditors. Answer this by sending a statement.

"Yours, respectfully,

"DERINGER TODD.

"Affixed below is the signature of my Bro., Wm. H. Todd.

"Address: D. Todd, No. 1111 Division St., Philada., Penna."

Two days later the writer repented, and wrote the following letter:

"PHILADELPHIA, *November* 23*d*, 1882.

"DEAR SIR: I hereby withdraw and recall the contents of the letter written to you by me. The same was said and written and caused to be done through prejudicial and biasness caused by my brother Wm. making remarks not suitable to the occasion; therefore the letter is mistakable and wholly unwarranted; and, on the other hand, Capt. B. H. Smith has established the truth, so far as we know, and he never received any compensation for his services from Wm. H. Todd, and in his claim he asserts his rights only, and the truth in the matter will support the same, as we all know he never was paid for his services; therefore, his judgment he obtained was a righteous one. If that is what you wanted, that is all we can give you. We can merely testify that he established the truth beyond a doubt.

"DERRINGER TODD,

"No. 1111 Division St., Philadelphia, Pa.

"N. B.—Therefore, as I say, the former letter was written maliciously."

We infer that this last letter was not agreeable to appellants; for, when the writer of it was examined as a witness, one of their counsel below having asked him whether it was in his handwriting, and the witness having answered in the affirmative, the same counsel asked:

"Did you believe in a hell before it was taken out of the Bible?"

To this the witness answered:

"Since I read the Bible I knew there was a hell." (Tr., 91.)

It was clear enough that it was the first letter that the witness had occasion to repent of. It was drawn forth by the flattering prospect that if the creditors succeeded in annulling the title of Smith, he, as an heir of Todd, would come in for a share of the spoils. This, of course, was a delusion.

Anderson *v.* Dunn, 19 Ark., 650.
King *v.* Clay, 34 *Id.*, 291.
Jordan *v.* Fenno, 13 *Id.*, 594.

The last letter written by this witness was clearly not the result of more enlightened views of the law, but of the workings of his conscience—a circumstance which seemed to excite the animosity of the examining counsel.

A further account of his conduct in the matter is given by Mrs. Smith in her deposition. (122.)

No one can read the testimony of Mrs. Mole, a daughter of Todd, and her husband, as compared with the other testimony in the case, without being convinced that they testified as witnesses engaged in prosecuting a suit in which their evidence was to be used in their own interest. It must be apparent that evidence thus obtained is entitled to credence only in so far as it is corroborated.

William H. Todd was a resident of Philadelphia, and had been at one time a man of large means. He owned lands in that city and in other parts of Pennsylvania, and also in Kentucky. He owned, also, extensive bodies of land in Chicot county, Arkansas, fronting the Mississippi river, for which he had paid from $85,000 to $90,000. (269.) He would, no doubt, have gone on safely and prosperously to the end, but the civil war came on, and proved to be too much for him. His valuable possessions in

Arkansas were dilapidated and destroyed; the levees were broken, and so the lands were subject to overflow; the plantation had to be re-stocked—everything to be begun again. Then followed all the disasters that overtook Southern planters soon after the war. One misfortune followed another, until thousands became impoverished, and the Bankrupt Act of 1867 became a necessity. Mr. Todd was particularly unfortunate. He was an old man, with a large family. His health was bad. He could stay in Chicot County but a very small part of the year. He had a surgical operation performed on him, and he had to keep near a physician that understood his case. (244.) In the meantime, he was beset with lawsuits in Pennsylvania, in Kentucky, in Arkansas. With the credulity of men broken in health and much advanced in years, and struggling with financial difficulty, he believed that he must eventually succeed in all of his suits; and so he contested until judgments were obtained against him. Then he hoped to renew the litigation in chancery, or to prolong it by appeal, not doubting but that his cause must triumph in the end. At the worst, he believed that in a little while his property would go up in value, so that he could pay off the claims against him, if they should finally be adjudged in favor of his adversaries, whether they were just or unjust. But all this time he was at his wits' ends to find money to pay costs and lawyers' fees. Many of his letters are copied in the transcript. They are of the most confidential character. In them the old man talks familiarly about his children, his grandchildren, his domestic affairs, his farming interests, his numerous and complicated lawsuits, with much of the artlessness of a child, and with a solicitude that is pathetic. Of the character of his lawsuits we are not in a position to judge; but no one who has read these letters, garrulous and simple as they are, can for a moment doubt but that he believed himself to be in the right. Nowhere does he express any desire for money

for his family or himself. Indeed, he had mortgaged every shred of property for the payment of his debts, and his sole aim and anxiety was caused by an intense desire to get out of debt. It is impossible to read these letters without a sentiment of pity for a man so old and infirm fighting an unequal battle against a host of difficulties which he could never overcome; greatly impaired in body and mind, ruined in estate, but continually hoping, amid all his desperate surroundings, that everything would come out all right at last. He kept up the ineffectual struggle to the end, and died on the 13th day of May, 1879, in absolute penury. It is due to the man who thus suffered that it should be said that, though the appellants have ransacked his private correspondence in every possible way, they have not been able to indicate a word that has the slightest tendency to put a cloud on his memory.

Captain Benjamin H. Smith, the appellee, got his title at sea, and not in military service. He was a sea-faring man, a member of the firm of Yates & Porterfield, of Brooklyn, N. Y., owners of vessels, of one or more of which he was commander. (111, 270.) On the 11th day of August, 1864, he married Josephine, a daughter of Todd. The latter induced Smith to give up his business in Brooklyn and to go to Chicot county in April, 1867, (249,) in order to advance his interests there by running his two plantations. That was not in the existing state of things, when the labor of the country was disorganized by political excitement, the levees broken, everything at sixes and sevens, a trivial undertaking, as any one may well know. Smith bought a half interest in the Bellevue place. Now, it is seriously contended that Smith was in duty bound to superintend both places without making any charge for his services, and for all the difficulties and dangers that he had to encounter. This is a mere assumption; for no reason is assig[redacted]or this singular proposition which is at the bottom of the [redacted]ase f[redacted]ppellants. If Smith had been the son of

Todd instead of his son-in-law, he would have been under no legal obligation to serve him after he had attained his majority. Smith well says in his testimony that the amount that he agreed to take for his services was very little; hardly worth mentioning. (260.)

To help out their case the plaintiffs asserted in their bill that the property bought by Smith was worth $20,000.

This statement was exceedingly disingenuous and misleading; for the plaintiffs well knew at the time of making it that when Smith made his purchase the lands were incumbered by a mortgage to the Real Estate Bank for about $18,000, and by a decree in favor of Joseph Woolfolk for $9,743. This was a matter stated in the answer of Smith, (Tr., 14,) and was proved at the hearing. (Tr., 386.) The exact amount decreed to the Real Estate Bank on its mortgage was $20,093.95 and costs. At the same time the master in the foreclosure proceedings reported the lands to be worth $7,560. (Tr., 382.) The decree of foreclosure in the Woolfolk suit was affirmed in this Court. (See Woolfolk *v.* Smith, 115 U. S., 143.) At the time that Smith testified, the debt secured by the Woolfolk mortgage amounted to $10,000 or $11,000. (Tr., 241.)

Springer, as administrator of Todd, filed an answer denying fraud. (16.) He and Smith afterwards filed an amended answer alleging that letters of administration were granted on the estate of Todd on the 4th day of August, 1879, and that plaintiff's demands were not presented to the administrator, as required by statute, before the end of two years from the granting of said letters. (18.)

First Proposition—The plaintiff's demands not having been presented to the administrator within the time prescribed by law, they were barred.

See copy of letters of administration, 464.

There were attachments issued in behalf of the appellants against Todd; but, of course, on the rendering of the judg-

ments the attachment liens were merged in the judgment liens.

Respecting the latter liens, the statute provides:

"Liens shall commence on the day of the rendition of the judgment, and shall continue for three years, subject to be revived as hereinafter provided."

Mansf. Dig., 3918.

The statute goes on to provide how a judgment lien may be extended for an additional three years by *scire facias*.

The lien of a judgment in a Federal Court extends to all the lands in the district.

Trapnall *v.* Richardson, 13 Ark., 543.

All claims not presented to the administrator within two years after the grant of letters are barred.

Morgan *v.* Hamlet, 113 U. S., 449.

The lien must be revived within three years, or else it is at an end.

Barber *v.* Peay, 31 Ark., 392.

Although no affidavit is required for the legal exhibition of a claim against the estate of a deceased person upon which an action was pending at the time of his death, yet such action must be revived against the administrator or executor within two years from the grant of letters, or the claim will be barred like any other not legally exhibited.

State Bank *v.* Tucker, 15 Ark., 39.

Before suit brought plaintiff must make the affidavit required by law, or else his suit will be dismissed.

Ryan *v.* Lemon, 7 Ark., 78.

On the death of a defendant the suit may be revived by *scire facias*. But here the first suit was dismissed, and there is no authentication of the demand before the new

suit is brought. Hence it cannot be maintained, as held in Morgan *v.* Hamlet.

State Bank *v.* Tucker, 15 Ark., 40.
Bennett *v.* Dawson, *Id.*, 412.
S. C., 18 *Id.*, 334.
Green *v.* Brooks, 25 *Id.*, 318.
Connelly *v.* Weatherly, 33 *Id.*, 658.
Frellson *v.* Green, 19 *Id.*, 378, and cases cited.

The affidavit cannot be waived by the administrator.
Alter *v.* Kinsworthy, 30 Ark., 756.

Springer testifies that he was never served with process in the first suit, and that he never authorized an entry of his appearance to it. (446.) So the first suit is out of the question.

Letters were issued August 4, 1879. The present suit was begun November 21, 1882.

Second Proposition—The evidence showed that the bill was without equity.

Under this head it is not at all necessary to make an argument. It is only necessary to call the attention of the Court to various mistakes into which counsel for appellants have innocently fallen in making up their brief:

MISTAKE 1.—One of the many unique badges of fraud relied on by the appellants is that Todd did not plead the statute of limitations to a part of Smith's demand. (P. 5.) But surely it was never held that it was a fraud for a debtor to fail or refuse to plead the statute bar to a demand. Some men have conscientious scruples which forbid them to interpose that defense even against an unjust demand.

MISTAKE 2.—"It is well-known that there was a manager on Yellow Bayou; and to that extent, at least, the claim was not well founded." (P. 5.)

The evidence does show that Todd employed Kirk, Mole, and others to stay on Yellow Bayou to look after the fences and the stock, and to do whatever Smith told them, he having a general supervision of both plantations and of the sale of their products. Even Mrs. Mole admits that Smith controlled "the shipments of cotton, and seen that they [the managers] done the things right" on Yellow Bayou. (Tr., 42.) These men were such as Todd, in his embarrassed circumstances, could pick up for small pay. He paid them $50 and $60 a month. (50, 127, 399.) They were jealous of the superintending power of Smith, and gave him no little trouble. But they all admitted that Smith had the superior control over Yellow Bayou. (Tr., 50, 51, 52, 53, 54, 55, 56–61, 62, 64, 66, 67, 68, 70, 71–73, 77, 78, 80–86. See, also, letters of Todd, 21, 22, 23, 25, 26, 27; and testimony of Cooper, 161.)

The foregoing references are all to testimony introduced by appellants. Another witness for them (White) showed the same thing, (389,) as did Ruddick, (396,) Chapman, (397,) Simmons, (398, 399, 400,) Ward, (400,) Jeter, (408,) Sanders, (409,) Brown, (416,) Smith, for plaintiffs, (417, 420,) Turner, (421, 425,) Coltenham, (428,) Parish, for plaintiffs, (430, 431,) Frawick, (433,) Banks, (434, 437,) Thurman, (437–439,) Thompson, (440, 441,) Tripp, (442, 443,) Bowie, (444, 445,) Turner, (445,) Willing, (448,) Carlton, (451, 453, 454,) Holland, (459,) Mole, for plaintiffs, (50, 51, 52, 53–57, 59–62, 64, 66–68, 70–73,) Kirk, for plaintiffs, (78, 80–86,) Derringer Todd, (88–90,) Mrs. Bowles, (91–93, 96–105,) Mrs. Smith, (107–137,) R. H. Todd, (139–148,) Cooper, for plaintiffs, (161,) Cohen, (238,) Smith, (240–270,) Bowles, (165–169.) See, also, letters of Todd, (171–173, 270–292, 296, 402–405.) All the testimony on both sides goes to show that Smith had the general control over Yellow Bayou as

well as Bellevue. He not only had to perform the duties arising out of this relationship, but he had also frequently to give bond and to take all necessay legal steps to release the property of Todd when it was levied on. (See Derringer Todd's, (90,) and Smith's testimony, and various other witnesses.

MISTAKE 3.—Todd, on the 22d August, 1876, made a mortgage to Smith on personal property to secure payment of a debt of $5,000. This, we are told, is a fictitious amount, not the real amount, "if anything at all was due;" it "shows that Smith's claim for services was not taken into account by Todd as an indebtedness due Smith." (6.) What if that were true? Would it destroy Smith's demand if Todd did not recognize it? It seems that Todd was of the opinion that he was not to pay Smith for his services, and he did contest the demand, and a jury found a verdict against him. It is not surprising that he should have forgotten, amidst a thousand troubles and distractions, his agreement with Smith; but can it be seriously contended that if a creditor has two demands against a debtor, and gets security on one and not on the other, the latter is to be considered as being unfounded?

MISTAKE 4.—It is said that the view that Smith's claim was not for the right amount is "sustained by Todd's statement in his letter of June 30, 1876, shortly before the attachment suit, where he sums up what he owed Smith, and makes it $3,000, and offers to confess judgment for the amount, and so secure him if others did press their claims." (6.) There is no earthly doubt but that Smith performed the services for which he sued, nor that they were worth $1,000 a year. It would be singular if he could be deprived of this demand because Todd spontaneously offered to confess a judgment on other claims that Smith had against him, which were, as he says, "$3,000 for advances on the levee, and other payments made on the purchase of the gin from

the Woolworth estate, and other outlays on the Bellevue place, and cotton advanced or loaned me over my share;" (271;) that is, on cash balance due.

MISTAKE 5.—It is said that, because Smith did not charge all the interest that he might have charged on his account against Todd, the discrepancy "shows the judgment to be fraudulent, unless explained by the parties." (6.) We had heard before that if a judgment was rendered for considerably more than could be justly claimed, fraud might be presumed; but this is the first time, perhaps, that it was ever contended that when one sues another he is under a legal obligation to claim the last farthing due. All the testimony introduced goes to show that Smith dealt kindly and considerately with Todd on account of his age, his infirmities, his embarrassments, and their relation to each other. He delayed suing until the last vestige of property of Todd was about to be swept away by other creditors. If, when he did sue, he was willing to forego any part of his demand, it is difficult to see how other creditors could complain of that circumstance. As between Smith and Todd, the act would not seem to be reprehensible, unless it is true that it is the highest duty of every creditor to claim, like Shylock, everything that is "denominated in the bond."

The appellants are not very consistent. They first contend that Smith should have performed all of his services for Todd without compensation, and then they say that if he did not claim the last cent that he was entitled to he was guilty of a fraud.

However, we admit that this proposition is quite up to the level of the rest of the argument.

MISTAKE 6.—Another tremendous mare's nest is that "it is clear that Smith did not regard his services as an indebtedness due from Todd at any time prior to his suit, for if he had done so he would have, from time to time, as each

year's salary accrued, charged the same against Todd." (7.) That is to say, that if a man is to receive a salary of so much a month, and he does not enter it on his books month by month, he must lose it. But the manner in which he kept the account was not shown. Certainly the force of quibbling can no further go.

It would seem to be useless to waste time on such trifles. But where a case is made up of trifles, what is one to do?

MISTAKE 7.—"Again, in 1873, Smith and Todd had a settlement of their business relations, in which Smith paid Todd $8,250, the balance of the purchase-money for the undivided half of Bellevue plantation, and also $2,350 in settlement of a transaction concerning a gin." (P. 7.)

Hence it is inferred that Todd did not owe Smith anything for personal services. But there is no evidence that they had a general settlement. Todd had borrowed money from Smith at various times, and owed him for money paid for his use. (250, 252, 256, 276.) It was natural enough that when Todd was in debt to Smith for the amount of the purchase-money of the land the latter should wish to get the title to his part of Bellevue free from the entanglement of Todd's affairs. The presumption of payment only arises where there has been a general settlement, and even then it may be overthrown very easily by explanatory testimony. There were many reasons why Smith would not wish to go to law with Todd at all, and particularly not until after he had his title to one-half of Bellevue made clear. Counsel say:

"In this settlement nothing was said about Smith's charges for services."

This is mere assumption, for there is no testimony to show that there was a settlement, or what was said or what was not said. We only have a written receipt for specific payments. Smith explains why the amount due him for

services was not exacted. He says that it was "because Mr. Todd wanted all he could get to pay his indebtedness, and wanted me to wait." (262.)

MISTAKE 8.—During all the correspondence between Todd and Smith (it being all on one side, so far as shown,) no mention is made of the fact that the former owed the latter anything for services. (P. 8.) Thus, if a debtor does not mention any debt that he owes, it must be presumed not to exist. There is hardly one of the letters that does not show that Todd recognized the fact that Smith was in his employment. The reason that he did not mention the subject of payment is obvious. Smith was not pressing him, and he had his hands full with creditors that were attacking him on every side, and he was calling on Smith to advance money for him all the time.

MISTAKE 9.—The fact that in his letter of June 30, 1876, Todd "goes into details concerning his business," (271,) "even to a concise statement of the amount he owed Smith for advances," shows that he owed Smith nothing for his services. (9.)

The letter does not give any general details of Todd's business, nor does it pretend to do so. The fact that Todd carefully limits his offer to confess judgment for the amount of Smith's advances would rather indicate that he did not wish to be understood as extending the offer to any other class of liabilities.

MISTAKE 10.—"When he (Todd) desired the services or aid of Smith for any purpose in connection with the Yellow Bayou plantation, he gave him specific power and authority in writing." (P. 9.) This, it is said, "was done as late as November, 1874, when trouble arose between Mr. Seaman, the manager of Yellow Bayou, and Mr. Todd." The name of this person is frequently spelled Simmons. The reason of the giving of this power of attorney was that it

was hard to get him off the plantation, and an authority in writing was deemed important. (265.) Simmons himself, a witness for appellants, says that Todd told him that Smith would pay him $400 for his services on Yellow Bayou, which he did; and that Smith did many other things relating to the management of that plantation not mentioned in the power of attorney. (400.) He also attaches letters to his deposition written by Todd, in which he is referred to Smith for a variety of things.

MISTAKE 11.—Smith's judgment against Todd was recovered July 25, 1877. J. F. Robinson appeared for plaintiff, and J. R. Martin for defendant. In January and February, 1878, Smith paid for Todd $200 to each of these persons. (226.) Appellants say that this is a significant fact. (10.) If it is a suspicious one, why did not they follow it up, and inquire on what account these payments were made more than eighteen months after Smith's judgment was rendered? Todd's letters show that he was employing lawyers in all parts of the country in all sorts of cases. Appellants made no point on these payments in their testimony, and they cannot do so now, when no explanation can be made.

MISTAKE 12.—Fraud is shown by the fact that in Smith's account, upon which he sued Todd, dated August 4, 1876, he charged for eight years' services, beginning from January, 1869. (10.) Mr. Smith explains this. It was the mistake of his attorney. His account really began on the first day of January, 1868. (260.) As the first year's salary did not become due until the first day of January, 1869, the error of the attorney was a very natural one. It is not denied that Smith was engaged on the plantation in 1868. There is a vast difference between a mistake and a fraud; and Smith could have had no possible motive in having the account made out erroneously, as it was. That

made out by himself for the Probate Court was correct. (227.)

MISTAKE 13.—Counsel cite Bump on Fraudulent Conveyances to prove that services performed by different members of a family for each other are presumed to be gratuitously rendered. Smith was no member of Todd's family; and that rule has never been applied except as to casual services, which may justly be supposed to be compensated by like services in return. It could never be made to apply to laborious and continued services, remote from the centre of family life; and in no case was it ever so applied.

MISTAKE 14.—Mrs. Smith knew of no contract for a salary, and hence there was none. (12.) Mrs. Smith says that, if there had been a *written* contract, she would have known of it; because, presumably, she was familiar with her father's papers. But she added, "I have frequently heard them talking about it." (108.)

MISTAKE 15.—The Cooper judgment was fraudulent, and hence the Smith judgment was fraudulent also. (13.) In answer to this we might merely say that the Cooper judgment is not attacked in the pleadings; or that Smith can hardly be condemned for a fraud without showing that he had some connection with it. It is true that he bought from Robinson, who bought under the Cooper judgment, but there was no fraud in that. Nor is it shown that Smith acquired any advantage of any kind under that purchase.

No man can read Cooper's testimony without respect for the man. He was a witness for the appellants. He was one of the last friends that remained to Todd in the days of his adversity. He lent him money at all times in varying sums; and when Todd's destiny was sealed, he continued to lend him money, making no charge, as he says, "as I had no hopes of getting anything back after that." (159.)

He did not know that Todd had confessed judgment in his favor; but it was always understood that he would secure him as far as he was able. He went with Todd two or three times to Mr. Fox, in Norristown, to borrow money to pay his most pressing debts. "He also offered me a high rate of interest if I could raise money for him. There was nothing said about my claim. I always pushed it off. I did not press him for it, and told him to never mind it." (163.) Todd always told him that he was certain to gain his large lawsuits, and then he would have plenty of money, and would pay everything he owed. In Philadelphia no one had ever charged Todd with fraud. Todd had conveyed him some property to secure his debt, but it was incumbered, and an expense to him, and he had conveyed it to Mrs. Smith. (See her testimony.)

It may be that Todd confessed judgment in favor of Cooper for more than he owed him. The fact was not in issue, and has not been inquired into; but if that is true, it was because he wished to secure him thereby for advances that he thought that Cooper would make to him. At any rate, Smith was more than a thousand miles away, and knew nothing of what these parties were doing. Smith was not acquainted with Cooper until 1883, long after all of these transactions. (250.)

MISTAKE 16.—It is stated that Smith swore to one thing at one time, and then swore that his first statement was not true. (15.) This refers to the error in the account made by the attorney, which was explained by Smith when the matter was called to his attention. After a prolonged and exhausting cross-examination, covering many pages, this is the only disparaging thing that can be said of his testimony, after an incubation of five or six years. If no one is to be believed who has ever made a mistake, we shall have to send to paradise for witnesses, and shall have to be very careful in our selection even then.

MISTAKE 17.—There was no use for Smith to sue for his claim, since Todd had offered to confess judgment for advances made. Of course he would have confessed judgment for the salary if it had been an honest claim. (P. 15.) Honest people sometimes honestly differ. Todd delayed, and finally did not want to pay any salary. In his way he probably thought that he had been the making of Smith, as John Adams thought that he had made Washington—a harmless delusion.

MISTAKE 18.—Note the inconsistency on the very same page: First, there is a fraud, because Todd would honestly have confessed a judgment if Smith's claim had been an honest one. Then it is said that he was dishonest, and would not pay Mole or Kirk; (15;) in short, would not do anything. But suppose that Todd had confessed a judgment in favor of Smith; then what a cry we should have had about collusion! In any case the argument is the same: Smith ought to have done just what he did not do.

MISTAKE 19.—Mrs. Smith has got all of Todd's property in Philadelphia. (16.) Any one that will take the trouble to read her deposition on that subject, in connection with those of Cooper and Byrne, will readily see that, in getting some property that was incumbered beyond its value, she got nothing.

MISTAKE 20.—"All of Todd's children in this matter have shown themselves to be a bad lot." (16.) Then why did appellants endeavor to engage them as witnesses by promising them a part of the fruits of the litigation? Does this remark show that appellants are "looking after their interests," as promised? Having attempted in vain to seduce, they now denounce. Potiphar's wife did much the same. "Mrs. Mole," we are told, "was certainly indorsed by her father as a pure-hearted woman." Todd is first denounced by appellants as an insincere and a dis-

honest man; and then he is introduced as a witness to bolster up the character of Mrs. Mole. This is a fair sample of the inconsistency that runs all the way through the case of the appellants. It is creditable to Todd that he was in a large measure disposed to shut his eyes upon the unhappy career of his daughter; but upon the Court other duties are enjoined.

As to the rest of Todd's children who testified in this cause, the remark falls flat; for there is nothing in the record that can in the least degree reflect upon the character or standing of any one of them. It is true that Derringer Todd for a moment wavered in his allegiance to truth and duty. The situation was a trying one. Born in affluence, he saw himself suddenly reduced to penury. To his credit be it said that when he had a little time for reflection he put the temptation far from him. And for this repentance the appellants jeered at him while he was on the stand as a witness, though they did not pretend to be able to disprove a word that he had said. With the exception of Mrs. Mole, all other children of Todd stand not only unimpeached, but unimpeachable. So far as shown, they have not spoken any untruth; nor have they held out any delusive hopes in order to induce others to give biased testimony.

MISTAKE 21.—"The witness, Mr Mole, gives a solution of the matter of the suit for $8,000 when she says that it was an arrangement between Todd and Smith to protect Todd and his children from his debts and liabilities." (16.)

We know already how it was that her sympathies were engaged for the appellants; so that she was made willing to attempt to blacken the memory of her father. As a wayward child, she had doubtless given him more trouble than all his lawsuits and debts put together. She had been married and divorced so often that she did not pretend to know the names of her different husbands. (43.) In this

respect, the woman of Samaria could not hold a candle to her. Counsel say that we cannot prove her individual sins. True; but we can take what she says of herself as a part of her testimony. No attempt was made to impeach her. It was not worth while. But, in the absence of any attack on her character, the appellants undertook to prove that she was a person of good character—and by whom? One Ann Tyson, of Philadelphia, seventy-two years old, who signs her name with a mark, and who, when asked what her business is, says, "I stand in the market," as if that was any business. (170.) No other testimony on that point was taken.

Ann Tyson also broke down in trying to call the roll of Mrs. Mole's husbands. Mrs. Mole's testimony is not corroborated by anything. She says that Todd often denied before all the family that he owed Smith anything. All the other members of the family emphatically deny this assertion.

MISTAKE 22.—"Yet the evidence shows that Smith's pretended claim for services as such agent or manager was not disclosed, but concealed by him and Todd from all persons with whom dealings were had, including appellants, until August 4, 1876." (17.) No page is referred to by counsel. In truth, there is not a syllable of testimony to that effect.

MISTAKE 23.—Smith did not pay Todd's funeral expenses. (16.) We believe that this is not made an issue in the case.

But what becomes of the quotation by counsel from Lord Holt, "Look ye, you may bring instances to give an account of the general tenor of his conversation, but you do not think sure we will try now at this time whether he be guilty of robbery, &c.?" (P. 17.)

MISTAKE 24.—Smith is represented as having got rich on a salary of $1,000 a year. (18.) It was never alleged

that Smith was not a man of means when he went to Chicot county. He says that he was; and his wife says so; and they tell what business he had been in, so that it was easy to ascertain what the real facts were. (111, 240.) Instead of taking testimony on this subject, which they knew would lead to no profitable result—having taken proof on every other subject under Heaven—the appellants prefer to rest their case on suggestions of such possibilities as their personal and pecuniary interests may inspire.

MISTAKE 25.—The management of Yellow Bayou was in the hands of other competent managers and of the leading tenants of the place, and Smith did not in fact perform the services for which he claimed pay in his suit." (19.) And this notwithstanding the contrary is proved by every witness in the case. The appellants did indeed attempt to prove that the services of Smith on both plantations were not worth the paltry sum of $1,000 a year, but they broke down hopelessly, and now this is all that they have to say on the subject, dealing as usual in vague assertions and extensive generalities. For less services on the same plantation, Robinson paid in 1867 to Hicks, as manager, $2,000 a year. The transcript says $200, but that is an error in copying, which has been cured by a stipulation filed in this Court.

MISTAKE 26.—"The strictures upon the conduct of the vendee in Byers *v.* Surget, 19 How., 303, are not wholly inapplicable here." (20.) "*Wholly*" is good. In that case the appellant bought a very large body of land in satisfaction of a trivial judgment for costs. In this case we have seen that when Smith bought, the land was incumbered for more than the bill states that it was worth. Besides, if the purchase was so valuable, why did not the appellants buy? The sale was an open one. They might as well have been looking after their own interests as to

be looking after the interests of Todd's children at a later day.

MISTAKE 27.—In brief for appellants it is said: "And as there was already a specific lien fixed on the lands by the attachment suits of appellants, no affidavit of the justness of the demands in enforcing the liens was necessary."

Hall *v.* Denckler, 28 Ark., 512.

Brief, p. 21.

Appellants' judgments were rendered February 2, 1878, and April 19, 1878.

The bill was filed Nov. 21, 1882, at which time there was no lien on the lands.

MISTAKE 28.—The worst mistake was to bring a suit without any testimony to base it on. Having dismissed one suit, it was a serious mistake to bring another under the same conditions.

Fraud is never presumed; nor is it sufficient to make out a suspicion of fraud. In this case there is nothing even to raise a suspicion.

Respectfully,

U. M. ROSE.